

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD FRYER : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
JO ANNE BARNHART, :  
Commissioner of Social :  
Security : NO. 04-0012  
Defendant. :  
 :

MEMORANDUM AND ORDER

Fullam, Sr. J. December , 2004

Cross-motions for summary judgment and a motion to remand have been filed in this social security case. Plaintiff seeks reversal of the final decision of the Secretary denying plaintiff's application for Disability Insurance Benefits.

Plaintiff has been considered disabled since December 1, 1999 for purposes of Social Security Income, but has been denied benefits for the period from February 11, 1996 (the injury onset date) to December 31, 1996 (the date last insured).

Plaintiff has had two hearings in front of an ALJ, and was 53 years old at the time of the first hearing. He has an eighth grade education, and has worked as a welder and auto body mechanic prior to becoming disabled in 1996. Plaintiff now suffers from severe C6-7 radiculopathy on his right side, and has been given a residual functional capacity (RFC) including the following limitations:

(1) never operating hand/arm controls with the upper right extremity; (2) never climbing rope, ladders or scaffolding; (3) never crawling; (4) only occasional stair climbing, stooping and kneeling; (5) no work with his head/neck in a fixed position; (6) no exposure to extreme heat, cold, humidity, water, fumes, dusts or poor ventilation; and (7) no exposure to fast moving machinery, sharp objects or loud noises.

See Record at 30, Finding 7. Based on this RFC, the Vocational Expert (VE) posited that the Plaintiff could perform two jobs, a Laminating Machine Offbearer and Burner in the brick and tile industry. It seems clear to me that someone with Plaintiff's limitations could not possibly perform either of those jobs. Presumably, employment as a tile burner involves exposure to heat and noise and requires the use of the hands. Similarly, work as a machine offbearer would require proximity to machinery and long periods of standing. As a result, neither job comes close to fitting the constraints of this plaintiff's disability.

Under 20 C.F.R. § 416.920, to prove that a claimant is not disabled the Secretary must show that there is significant work in the national economy for a claimant to perform, taking into account the claimant's age, residual functional capacity, education, and prior work experience. The testimony of the VE in this case falls far short of this standard.

The Secretary asked that this Court remand the case to an ALJ for a third time in order to obtain a proper VE

recommendation. Plaintiff contends that the record in this case is sufficiently developed to merit an award of benefits. The secretary had two opportunities to develop the record and justify the denial of benefits, but has failed to do so. I agree with Plaintiff. See *Allen v. Bowen*, 881 F.2d 37 (3d Cir. 1989) (holding that plaintiff was to be awarded benefits where medical evidence conflicted with the VE and the Secretary had already been given a full opportunity to develop the record).

The VE was asked a very direct hypothetical based upon plaintiff's RFC, and responded with jobs that the plaintiff could not perform. I will not assume, as Defendant would have me do, that somewhere there lies a job that plaintiff could perform. The Secretary has been given two bites at the apple in this case, and there is no compelling reason why this Court should delay Plaintiff's receipt of benefits further with another remand.

Accordingly, I find that the Secretary has failed to meet the burden imposed by 20 C.F.R. § 416.920, that plaintiff is unable to perform any light work and has been limited to sedentary occupation since February 11, 1996. The case will be remanded to the Secretary for an award of benefits.

An Order follows.

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	:	

ORDER

AND NOW, this            day of December 2004, upon  
consideration of the cross-motions for summary judgment and the  
responses thereto, IT is ORDERED:

1. Plaintiff's Motion for Summary Judgment is  
GRANTED.
2. Defendant's Motion for Summary Judgment is DENIED.
3. Defendant's Motion to Remand is DENIED.
4. The case is remanded to the Secretary for an award  
of benefits.

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John P. Fullam, Sr. J.